No. 73-1327

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

ALEXANDER HAMILTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the trial court erred in excluding unsupported opinion evidence, offered without a foundation, that he was not predisposed to dealing in narcotics.

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of distribution of cocaine and of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a). He was sentenced to concurrent terms of three years' imprisonment and five years of special parole. The court of appeals affirmed (Pet. App. A).

In February 1973, co-defendant Larry Narlock agreed to procure cocaine for undercover agent Ralph Orduno from a gaming dealer on the Las Vegas "Strip" named "Alex." (Tr. 131, 565-566) At the time petitioner was employed as a dealer on the Strip (Tr. 433-434). On

February 24, 1973, Narlock advised Orduno that he would sell cocaine for $1,000 an ounce (Tr. 60-62). Petitioner accompanied Narlock when Orduno met with him to examine the cocaine, and petitioner offered Orduno a sample of the cocaine (Tr. 60, 63). Orduno said he would have to "check it out" (Tr. 63-64). He submitted the substance for testing, then returned and paid petitioner and Narlock $1,000 for one ounce of the cocaine (Tr. 69-70). Petitioner also told Orduno he could get him a pound of cocaine the next day (Tr. 73).

The next day, February 25, Narlock called Orduno and told him the additional cocaine was ready (Tr. 74). Narlock and petitioner arrived at the place of rendezvous, showed Orduno the fifteen ounces of cocaine and were arrested. (Tr. 81-82).

Petitioner did not dispute the facts given above, but contended that he was entrapped. On cross-examination, petitioner testified that on February 25th he had voluntarily brought the narcotics to the room Orduno had specified for their meeting (Tr. 522-525); and that although he knew it was a crime, he nevertheless did so to assist his "close friend" Narlock (Tr. 534-536).

When petitioner's counsel attempted to ask a defense witness whether petitioner "was the type of person who would be engaged in narcotics" (Tr. 401-402), the court upheld the government's objection that counsel could not ask the witness for a personal opinion as to such an ultimate conclusion (Tr. 402). The court said that the rules of evidence allowed him to ask about the defendant's general reputation for good character (Tr. 402). Counsel then asked whether petitioner had a good reputation as a law-abiding citizen, to which the witness responded affirmatively (Tr. 404). Accordingly, the court's ruling

did not prevent counsel from establishing lack of predisposition; it merely reflected the well established principle of evidence that such conclusions are only for the jury to draw from the evidence adduced at trial. See Wigmore, *Evidence* (3rd Ed.), §§ 1981, 1983. See also, *e.g.*, *State* v. *Sinnott*, 24 N.J. 408, 132 A. 2d 298; *Watson* v. *State*, 156 Tex. Cr. R. 585, 244 S.W. 2d 515.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.